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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 701st MEETING

Held at Headquarters, New York,
on Wednesday, 28 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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00-50718 (E)

The meeting was called to order at 3.10 p.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/471 and Add.1-9)

Draft recommendation 48

1. The CHAIRMAN said that the Commission had resolved all issues relating to the recommendation with the exception of whether the first line should read "raising" or "obtaining" the funds required.

2. Mr. MARADIAGA (Honduras) said that, following consultations with the representatives of Spain and Paraguay, he no longer had any objections to the use of the phrase "recaudar los fondos" ("raising the funds") in Spanish.

3. Mr. Al-SAIDI (Observer for Kuwait) said that he still had doubts about whether the Arabic and French translations of document A/CN.9/471/Add.9 adequately reflected the meaning of the English word "raising".

4. The CHAIRMAN said that the Secretariat would look into the matter.

5. Draft recommendation 48 was adopted.

Draft recommendation 49

6. Mr. WALLACE (United States of America) suggested that the second sentence should be deleted. The first and second sentences both dealt with whether the contracting authority should give its consent to an assignment of the concession. While the second sentence stated that the concession should not be assigned without the consent of the contracting authority, the first sentence left open the possibility that such consent might not be required at all. It therefore reflected the type of flexibility that might be needed in the types of projects under consideration. The second sentence appeared to be too categorical in the light of paragraphs 61 to 63 of the report of the Secretary-General (A/CN.9/471/Add.5).

7. The CHAIRMAN said that the suggestion made by the United States representative raised a policy issue. He recalled that at the conclusion of its previous session, the Commission had decided that there should be no interference with policies which it had already established. He invited the representative of the Secretariat to comment on whether the United States proposal adequately reflected the Commission's previous decision.

8. Mr. ESTRELLA FARIA (International Trade Law Branch) said that there had been an extensive debate at the previous session as to the link between so-called direct agreements between the contracting authority and the lenders and the other principle reflected in the second sentence of the recommendation, to which the United States representative had referred. The final formulation had been arrived at following negotiations held between the Secretariat and outside experts at the request of the Commission. The idea was that the second sentence constituted a general principle and the first sentence an exception thereto.

The first sentence described a situation where an exception would be made by means of a direct agreement between the contracting authority and the lenders allowing for "step-in" rights or the transfer of the concession to a third party. Although strong views had also been expressed against the general principle as reflected in the second sentence, the prevailing view had been that the principle was one that was common to many legal systems, since the concessionaire was selected because of its ability to carry out the project and it should not be free to transfer that responsibility to third parties. In the course of the discussion it had been agreed to combine the two ideas, but perhaps greater clarity would be achieved if they were reversed.

9. The CHAIRMAN said that, as explained by the Secretariat, the decision reached by the Commission after much debate was the reverse of the position put forward by the United States delegation. The Secretariat was now proposing that the principle to be recommended was that concessionaires should not be free to assign the concession to a third party without the consent of the contracting authority except in the circumstances set out in the first sentence.

10. Mr. SAEIE ELDIN (Egypt) said that he was grateful to the Secretariat for the clarification provided and had intended to make the same proposal.

11. Ms. GAVRILESCU (Romania) and Mr. MARADIAGA (Honduras) said that they, too, supported the Secretariat's proposal.

12. Draft recommendation 49, as orally amended, was adopted.

Draft recommendation 50

13. Ms. GAVRILESCU (Romania) requested clarification of the term "intérêt majoritaire" (majority interest).

14. The CHAIRMAN said that the word "majority" did not appear in the English version.

15. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the term used in English was "controlling interest". In the case of a joint stock corporation, that would mean the person or entity controlling the majority of the voting shares in the capital of that corporation. The French delegation appeared to be satisfied that the term used in the French version adequately reflected the original English text.

16. Mr. JACOBSON (United States of America) suggested that the phrase "under specified circumstances" should be added at the end of the recommendation. That would reflect the discussion in paragraphs 63 to 68 of document A/CN.9/471/Add.5, which made it clear that restrictions on the transfer of the equity interest were limited in various ways and might not be appropriate in many cases.

17. The CHAIRMAN said that the United States proposal would significantly change the sense of the recommendation as drafted by the Secretariat. Under the United States proposal, transfer of a controlling interest in the concessionaire would be allowed except under certain specified circumstances. He invited the

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representative of the Secretariat to comment on whether that proposal adequately reflected the decision reached by the Commission at its previous session.

18. Mr. ESTRELLA FARIA (International Trade Law Branch) said that in its original draft the Secretariat had presented a more detailed provision, spelling out the circumstances under which it might be reasonable for the contracting authority to require that any transfer should be subject to its prior consent. A full discussion of the matter was to be found in paragraphs 64 to 66 of document A/CN.9/471/Add.5. It should be noted that recommendation 50 was one of the few recommendations in chapter IV that used the word "may"; it was therefore not as strong as the other recommendations in the chapter. The point made by the United States representative was implicit in the wording of the recommendation. Nevertheless, should the United States proposal be adopted, it would not be inconsistent with the overall sense of the Commission when it had last discussed the issue.

19. Mr. WIWEN-NILSSON (Observer for Sweden) suggested that the French version might be preferable to the English one, as the French text omitted the words "in the capital of".

20. Mr. SARIE ELDIN (Egypt) said that, while it was legitimate to underscore the principle of the prior approval of the contracting authority, the concern expressed by the United States delegation might be allayed by adding the words "unless agreed otherwise" at the end of the recommendation.

21. Mr. JACOBSON (United States of America) said that he had no objection to the Egyptian proposal.

22. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to add the words "under specified circumstances, unless agreed otherwise" at the end of the recommendation and to delete the phrase "in the capital of".

23. Draft recommendation 50, as orally amended, was adopted.

Draft recommendation 51

24. Draft recommendation 51 was adopted.

Draft recommendation 52

25. Mr. MAZINI (Observer for Morocco) said that the Arabic translation of the recommendation reflected the exact opposite of the principle that the Commission was discussing. He suggested that some drafting changes should be made to the text: (a) should read "... so as to meet the evolving actual demand for the service"; (b) should read "... under conditions guaranteeing equal access to all users"; and (d) should read "The access of other service providers to the interconnection to any public infrastructure network operated by the concessionaire under objective, transparent and non-discriminatory conditions."

26. The CHAIRMAN asked whether the Commission as a whole was satisfied with the text as drafted.

27. Ms. NIKANJAM (Islamic Republic of Iran), referring to (a), said that it was unclear what the phrase "actual demand for the service" meant.

28. Mr. MORÁN BOVIO (Spain) and Mr. RENGER (Germany) said that the text as drafted adequately reflected the discussion at the previous session.

29. The CHAIRMAN said that the text would remain as drafted.

30. Draft recommendation 52 was adopted.

Draft recommendations 53 to 55

31. Draft recommendations 53 to 55 were adopted.

Draft recommendation 56

32. Mr. JACOBSON (United States of America) suggested that the final clause should be amended to read "except in exceptional circumstances". The intention underlying the recommendation was that parties should be free to choose the applicable law.

33. The CHAIRMAN requested the representative of the Secretariat to clarify whether the United States proposal related to a matter of policy.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) said that, to the extent of his recollection, the understanding of the Commission at the previous session had been in line with what the United States delegation was currently suggesting. The prevailing view had been that the concessionaire should have sufficient flexibility to agree on the applicable law with its contractors. "Public policy" referred to situations in which the concessionaire was an entity of public law that would be under certain restrictions in terms of agreeing to the application of foreign law to a contract that was executed in the country with another party that was a national of that same State. In some countries that might be considered a violation of public policy. Such circumstances would, however, be exceptional.

35. Ms. LI Ling (China) suggested that the words "public policy" at the end of draft recommendation 56 should be followed by the words "and law", since in her country, for example, the law provided that in certain cases Chinese law must govern such contracts.

36. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the philosophy of the Commission on the matter was reflected in paragraph 264 of the report on the work of the thirty-second session (A/54/17). At that session the Commission had recognized that freedom to choose the law governing commercial contracts was restricted in some countries under certain circumstances for reasons of compelling public policy, for example, in contracts where governmental agencies or consumers were a party. The prevailing view, however, had been that it was not desirable to restrict choice of law in general.

37. Mr. ADENSAMER (Austria) said that his delegation supported the Chinese suggestion and could not endorse the United States proposal. In Austria, as

indeed throughout Europe, consumer protection was considered very important and was enshrined in law, and contracts with consumers were too common to fit under the category of "exceptional cases". China's reminder that choice of law might be restricted by law as well as public policy was useful, because the term "public policy" could be construed narrowly as meaning public order, which would not cover the situations he had mentioned.

38. Mr. GHAZIZADEH (Islamic Republic of Iran) and Mr. MORENO RUFFINELLI (Paraguay) thought that a reference to the host country's law, as suggested by the Chinese representative, would provide welcome clarification.

39. Mr. WIWEN-NILSSON (Observer for Sweden) said that the text was better as it stood. The United States wording, "except in exceptional cases", might, contrary to the proposer's intention, be interpreted even more broadly than the original language. With regard to the Chinese suggestion, it should be recalled that whatever the Commission recommended, public policy would prevail in any case. The document was intended as a guide, not as a convention, and no country would be in any way bound to follow its recommendations.

40. Ms. MANOKLATANAKUL (Thailand) and Mr. Al-NASSER (Observer for Saudi Arabia) observed that it would be better to adhere to the language already agreed upon, since public policy would prevail in any case.

41. Mr. HERRMANN (Secretary of the Commission) said that the mention of "law" would result in something of a circular argument. The draft recommendations were intended as a guide to legislators, who would be looking at their own national laws and adapting them, to the extent that they were persuaded by the guide. Existing laws restricting choice might conceivably be changed in that exercise, unless they were based on the firm policy of the Government.

42. Mr. ADENSAMER (Austria) said that he had been convinced by the reasoning of the Secretary.

43. Ms. LI Ling (China) said that her delegation still felt that a reference to law would make the draft recommendation clearer.

44. The CHAIRMAN asked whether supporters of the proposed amendments were still of the same mind. Hearing no response, he took it that the Commission was willing to preserve the wording as it stood.

45. Draft recommendation 56 was adopted.

Draft recommendations 57 to 59

46. Draft recommendations 57 to 59 were adopted.

Draft recommendations 60 and 61

47. Mr. MAZINI (Morocco) suggested that draft recommendation 61 (a) could be made more concise by replacing the phrase "the occurrence of circumstances beyond either party's reasonable control" with the term "force majeure", which had a well-understood legal meaning.

48. Mr. HERRMANN (Secretary of the Commission) said that the equivalent in English of "force majeure" was "acts of God and acts of war", a concept which was too narrow for the purposes of draft recommendation 61 (a). It was customary in the Commission=s work to attempt to avoid technical terms, which might be well understood only in certain languages or legal systems, and to use instead more descriptive language, a policy that had been followed in other UNCITRAL texts, including the United Nations Sales Convention.

49. Mr. MAZINI (Observer for Morocco) said that he accepted the Secretariat's explanation, but he still found the word "reasonable" modifying "control" to be ambiguous and proposed deleting it.

50. Mr. RENGER (Germany) recalled that the chapter had been discussed at length during the thirty-second session of the Commission, a debate which was summarized in paragraphs 206 to 253 of the report on the session (A/54/17). To the best of his recollection, the present wording of draft recommendation 61 faithfully reflected the outcome of that debate.

51. The CHAIRMAN noted that there did not appear to be any support for the proposal by the observer for Morocco.

52. Draft recommendations 60 and 61 were adopted.

Draft recommendation 62

53. Mr. AL-NASSER (Observer for Saudi Arabia) said that his delegation would prefer a simpler wording for the first part of draft recommendation 62 (a). The words "it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations" should be replaced by "the concessionaire is unable to perform its obligations".

54. Mr. ESTRELLA FARIA (International Trade Law Branch) explained that the thinking behind that wording, and indeed behind the entire section on termination of the project agreement, was that the contracting authority should be empowered to ensure that services continued to be provided. By waiting until the concessionaire had already demonstrated its inability to perform its obligations, the contracting authority might fail in its own duty to ensure continuity of services.

55. The CHAIRMAN noted that there did not appear to be any support for the proposal by the observer for Saudi Arabia.

56. Draft recommendation 62 was adopted.

Draft recommendation 63

57. Ms. FOLLIOT (France) pointed out that the parallel presentation of draft recommendation 62 on termination by the contracting authority and draft recommendation 63 on termination by the concessionaire, together with the broad wording of the latter, might give the misleading impression that the concessionaire had the same rights to terminate the project agreement unilaterally as the contracting authority.

58. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the point raised by the representative of France had been debated at the previous session of the Commission, and the concern had been addressed in paragraph 28 of the notes on chapter V (A/CN.9/471/Add.6), which acknowledged that some legal systems did not recognize the concessionaire's right to terminate the project agreement unilaterally, but only the right to request a third party, such as the competent court, to declare the termination of the project agreement. Draft recommendations 62 and 63 had been made parallel for the sake of clarity of style.

59. The CHAIRMAN noted that there did not appear to be any interest in rewording draft recommendation 63.

60. Draft recommendation 63 was adopted.

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

Draft recommendations 64 to 67

61. Draft recommendations 64 to 67 were adopted.

62. The CHAIRMAN, recalling that the inclusion of the term "project agreement" in the title of chapter V had excited some doubts, invited suggestions for amending the titles of either chapter V or chapter IV.

63. Mr. MORÁN BOVIO (Spain) said that he preferred to leave the title of chapter V unaltered. It was an adequate description of the subject matter of the chapter, and if amended it might have an adverse impact on other parts of the draft guide.

64. Mr. SARIE ELDIN (Egypt) felt that the title of chapter IV was misleading, because that chapter did not deal with the various phases of construction. He referred to an earlier proposal by the representative of Singapore to amend the title to read "Content and implementation of the project agreement". That amendment could be adopted, the term "agreement" being replaced by "documents", since the construction and operation of a project might be dealt with in documents other than the agreement. The title of chapter V did not require amendment, because that chapter was concerned with specific aspects of the project agreement as such.

65. Mr. RENGER (Germany) said that he was reluctant to see the title of chapter IV altered. The notes made clear that the scope of the chapter went beyond the project agreement itself, dealing mainly with the construction works, the operation of the infrastructure and general contractual arrangements. The neutral wording of the title therefore offered advantages which should not be sacrificed.

66. Mr. SARIE ELDIN (Egypt) said that he did not agree with the German representative. In addition to the construction aspects of the project, chapter IV also dealt with the financial arrangements, assets and easements, the organization of the concessionaire, security interests, the assignment of the concession, and the transfer of a controlling interest in the project company.

All those issues were quite unrelated to the construction process. The title was therefore misleading, because it dealt with only part of the subject matter of the chapter.

67. Mr. WIKEN-NILSSON (Observer for Sweden) supported the comments just made. However, since no proposals had been made for a new title, he preferred to leave the question of its wording to the Secretariat.

68. Ms. Li Ling (China) also took the view that the content of chapter IV did not wholly conform to its title, since many aspects of the project agreement were covered in the chapter. She suggested including the words "project agreement" in the title.

69. Mr. WALLACE (United States of America) agreed with the observer for Sweden and the representative of China. He pointed out that there was no mention of the project agreement itself in the titles of most of the chapters. Chapter IV dealt with many things. It was quite appropriate to include the words "construction and operation" in its title, but that was not inconsistent with adding a reference to the project agreement. He suggested that the title might read "Content and implementation of the project agreement" or "The project agreement: construction and operation".

70. The CHAIRMAN observed that chapter IV covered the legal rules governing the project agreement, not merely the agreement.

71. Mr. WALLACE (United States of America) proposed that the title should read "Legal framework, content and implementation of project agreement".

72. Mr. DARCY (United Kingdom) said that he was happy to leave the wording of the title to the Secretariat.

73. Mr. PANG (Singapore) suggested "Execution of the infrastructure project".

74. The CHAIRMAN said that the prevailing view in the Commission was to follow the wording proposed by the representative of the United States, to include a reference to the project but not necessarily to the agreement, and to leave it to the Secretariat to determine the final wording.

75. It was so decided.

Draft recommendation 68

76. Mr. ESTRELLA FARIA (International Trade Law Branch) explained that the new text in the notes on chapter VI (A/CN.9/471/Add.7) reflected the revision of that chapter which had taken place at the Commission's previous session. The Secretariat had endeavoured in the notes to strike a balance between the interests of private parties in achieving flexibility in their arrangements and public policy concerns on the part of contracting authorities. However, it had not sought to enter into the details of dispute settlement procedures. Because little action was required from the Commission in a legislative sense, there were only four recommendations in chapter VI.

77. Ms. NIKANJAM (Islamic Republic of Iran) said that, since arbitration was only one of the methods of dispute settlement, the reference to it in draft recommendation 68 should be deleted.

78. The CHAIRMAN said the Commission should decide on its recommendations for dispute settlement, as a matter of policy.

79. Mr. SARIE ELDIN (Egypt) said that arrangements for arbitration outside the host country of the project should receive the Commission's endorsement. He suggested the insertion of the term "offshore" before "arbitration". However, judicial methods of dispute settlement should not be ruled out.

80. Mr. MORÁN BOVIO (Spain) said that the reference to arbitration was appropriate, because it was not always clear in relations between contracting authorities and concessionaires that there was a possibility of arbitration in the event of a dispute. The text of draft recommendation 68 adequately provided for all methods of dispute settlement and did not require any change.

81. The CHAIRMAN said that the issue to be decided was whether the wording of draft recommendation 68 was appropriate in a guide for legislators.

82. Mr. WALLACE (United States of America) said that the text of draft recommendation 68 did not make clear from which source the contracting authority derived its freedom to agree to various dispute settlement mechanisms. As a matter of logic, he agreed with the Iranian representative that the reference to arbitration was not necessary. However, many foreign investors would insist on the inclusion of such a reference. The Constitution of Turkey had recently been amended to provide for the possibility of arbitration, without which there could be no foreign investment in the energy sector. As the notes explained, different methods of dispute settlement were used at different stages of a project. There was also the problem of regulation: could a private arbitration override a regulatory decision? Since the notes commented very fully on alternative dispute settlement mechanisms, he felt that the deletion or retention of the words "including arbitration" in draft recommendation 68 was not a vital issue.

83. Mr. MYERS (Observer for the International Bar Association) pointed out that arbitration was the only method of adjudication which was not consensual. He did not object to the deletion or otherwise of the reference to arbitration, but he urged the Commission to keep its legislative recommendations simple and neutral, to enable States and contracting parties to choose the methods of dispute settlement which suited them best.

84. Ms. Li Ling (China) said that it was preferable to delete the reference to arbitration, because it was only one of the available methods. If it was mentioned, the other methods should be mentioned too.

85. Mr. MOHAMED (Nigeria) said that it did not really matter whether or not the reference to arbitration was deleted, but that if it was he would propose amending the recommendation to read that the contracting authority should be free to agree to dispute settlement mechanisms regarded by the parties "as best suited" to the needs of the project rather than simply "as suited".

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86. Mr. WIWEN-NILSSON (Observer for Sweden) said that his delegation would like to retain the explicit reference to arbitration. An arbitration clause was one of the first things most investors asked for, and they would object if Governments excluded it. If the reference to arbitration was deleted and if the notes on arbitration (A/CN.9/471/Add.7, paras. 30-38) remained neutral, it would not be clear that there was a preference in practice for arbitration.

87. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the observer for the International Bar Association had rightly pointed out why arbitration had been singled out in the recommendation. The Secretariat's review of national legislations and its consultations with experts, including representatives of regional investment banks and other multilateral lending agencies, had made plain that there was no legal obstacle to the use of other non-binding methods such as mediation. Possible obstacles to the freedom of the parties to agree to dispute settlement mechanisms arose only in States that made the court system the only option. Recourse to the courts was, of course, always available everywhere.

88. As to the concerns of the Swedish delegation, neither recommendations 68 and 68 bis nor the notes on them expressed a preference for any one method, since some legal systems still did not allow arbitration. The notes described what the outlook of the various parties and the expectations and preferences of the investors were likely to be and indicated that most private investors preferred arbitration, especially international arbitration. The draft Legislative Guide thus gave only a narrative account of the advantages and disadvantages of the various mechanisms without making a judgement as to whether a State should limit dispute settlement to the judicial system or whether it should instead be more flexible.

89. Mr. MARKUS (Observer for Switzerland) said that the Secretariat's comments were an argument for leaving the text as it stood, because if in some legal systems the arbitration option was in doubt or even forbidden, and if at the same time investors strongly favoured what was obviously the only binding option, the term "including arbitration" covered the situation.

90. Mr. WIWEN-NILSSON (Observer for Sweden) said that if the reference to arbitration in recommendation 68 was deleted, he would propose that the words ", and in many cases required", should be inserted in the third sentence of paragraph 30 of the notes, between the clause "Arbitration is preferred" and the phrase "by private investors and lenders, in particular foreign ones".

91. Mr. WALLACE (United States of America) said that the Swedish suggestion was an excellent one. Paragraph 30 could in fact be expanded in a number of ways, including the incorporation of Egypt's idea regarding offshore arbitration.

92. The CHAIRMAN said he took it that the Commission wished to leave the suggested revisions of paragraph 30 of the notes to the Secretariat.

93. It was so decided.

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94. The CHAIRMAN said that the prevailing view seemed to be either that delegations favoured, or that they would not object to, deletion of the reference to arbitration in draft recommendation 68.

95. Mr. MORÁN BOVIO (Spain) noted that a number of delegations had emphasized the importance of the reference to arbitration. It would surely be a mistake not to draw attention to the dispute settlement method to which, the bulk of the notes on recommendation 68 were devoted.

96. Mr. PINZÓN SÁNCHEZ (Colombia) said that he agreed with the Spanish delegation. The phrase in question was not prescriptive but simply illustrative, and the indication that arbitration was one of the options needed to be made explicit.

97. Mr. LALLIOT (France) said that he fully supported the Chairman's conclusion as to the sense of the Commission: the reference to arbitration should be deleted and the notes on recommendation 68 should be expanded as suggested by the United States and other delegations.

98. Ms. POSTELNICESCU (Romania) said that debate on the matter should not be reopened and the phrase in question should be deleted.

99. Mr. Al-NASSER (Observer for Saudi Arabia) said that he could accept either deletion or retention but that if the reference to arbitration was deleted from recommendation 68, then recommendation 68 bis would be superfluous.

100. The CHAIRMAN said he took it that the Commission wished to delete the final phrase ", including arbitration"; add the word "best" before the word "suited"; and adopt recommendation 68 as amended.

101. It was so decided.

102. Draft recommendation 68, as orally amended, was adopted.

Recommendation 68 bis

103. Mr. GHAZIZADEH (Islamic Republic of Iran) observed that in many States it was the project agreement and not the law that should indicate whether and to what extent the contracting authority might raise a plea of sovereign immunity.

104. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that the earlier discussion in the Commission regarding sovereign immunity had been reflected in its 1999 report to the General Assembly (A/54/17, para. 298). The degree of disagreement was reflected in the fact that recommendation 68 bis had been placed within square brackets.

The meeting rose at 6 p.m.

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Thirty-third session

SUMMARY RECORD OF THE 702nd MEETING

Held at Headquarters, New York,
on Thursday, 29 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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00-51130 (E)

The meeting was called to order at 10.05 a.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/471/Add.1-9)

1. Mr. WALLACE (United States of America) suggested that the last three recommendations should be as brief as possible, and that recommendation 68 bis should be deleted. It seemed to be a rather arbitrary choice of subject. Although the issue was important, it was discussed thoroughly in the notes.

2. Mr. MORÁN BOVIO (Spain) said that recommendation 68 bis should remain in the text, because the purpose of the Guide was to advise both legislators and investors. It was important that the legislation should indicate to what extent the contracting authority could plead immunity. The contracting authorities and States needed to be aware of the twofold effect of preserving immunity, which maintained the State's authority but could be a deterrent to investors. That idea, which was clearly explained in the notes, should be expressed in a recommendation.

3. Ms. GAVRILESCU (Romania) supported the United States proposal to delete recommendation 68 bis, which did not seem to be based on the Commission's policy, as expressed in the notes. The notes referred to the options available to States for settling any disputes in their relations with the concessionaire. There was emphasis on the voluntary nature of those options. There was also a reference to the conditions in which such solutions might be applied. Nothing was compulsory: the verbs were all in the conditional tense - the States "may" or "could" do something.

4. The recommendation was asking States to renounce their sovereign immunity. Perhaps the Commission should consider whether it was competent to discuss that sensitive issue. Recommendation 68 already offered States a free choice of settlement mechanisms, and recommendation 68 bis was thus unnecessary.

5. Ms. MANGKLATANAKUL (Thailand) agreed that the recommendation should be deleted. Sovereign immunity was an executive prerogative and could not be dealt with by a legislative body. Also, the concept of sovereign immunity in relation to commercial contracts had not yet been accepted in international law. Work was continuing in the International Law Commission, and the Sixth Committee had set up a working group to look into the issue. Any reference in the Guide should be consistent with the work of those bodies, and she therefore preferred the option of deleting the recommendation.

6. In addition, although paragraphs 33 to 35 of the notes contained in document A/CN.9/471/Add.7, concerning sovereign immunity, were acceptable, she felt that paragraph 36 should be deleted.

7. Ms. FOLLIOT (France) supported the proposal to delete recommendation 68 bis. She also proposed moving paragraph 36 of the notes to the beginning of the section on sovereign immunity, with a slight amendment at the end, to read "in which areas the contracting authorities may or may not plead sovereign immunity."

8. The CHAIRMAN said he took it that paragraph 68 bis would be deleted.

9. It was so decided.

10. Mr. WIWEN-NILSSON (Observer for Sweden) found the deletion of paragraph 36 of the notes acceptable, assuming that the last two lines of paragraph 33 would also be deleted. The question of whether there would be a waiver of immunity at the executive level was a decision relating to an individual project.

11. Ms. NIKANJAM (Islamic Republic of Iran) said that the Commission needed to establish the limits between the parties to the project agreements, and not leave sovereign immunity to domestic law.

12. Mr. MORÁN BOVIO (Spain) said that paragraph 36 of the notes did not add to or detract from existing sovereign immunities, but merely requested every State to declare as clearly as possible where the boundary of sovereign immunities lay. His delegation preferred to retain the paragraph in its present form, in order to draw the attention of legislators to the issue.

13. Mr. WALLACE (United States of America) supported the French proposal concerning moving paragraph 36 to the beginning of the section.

14. In response to the views expressed by the Thai and Iranian delegations, he said that the wording of paragraph 36 did not have any implications with regard to a legislative or executive prerogative. Some Governments, according to the notes, would not be free to deal with that matter unless the issue was clarified by law. He did not think that retaining paragraph 36 would in any way prejudge consideration of the issue by the International Law Commission.

15. The CHAIRMAN pointed out that paragraph 36 did not contain the word "should" or "must". It did not even use the word "may" alone, but the expression "may wish". The language could hardly be more benign.

16. Mr. RENGER (Germany) shared the views expressed by the French and United States delegations.

17. Mr. MARADIAGA (Honduras) pointed out that the Commission was discussing notes that were intended to instruct and enlighten legislators. Sovereign immunity was a fundamental prerogative; consequently, the more explanatory the notes were, the better. For the reasons outlined by the representative of Spain, he believed the paragraph should be retained.

18. Ms. MANGKLATANAKUL (Thailand) said that paragraph 36 did not seem to add anything to the notes or have any particular effect. However, if the Commission wished to retain the paragraph, her delegation would not object.

19. Mr. WIWEN-NILSSON (Observer for Sweden) said he understood that if paragraph 36 was retained and moved ahead of paragraph 33, the last sentence of current paragraph 33 would be deleted.

20. Ms. FOLLIOT (France) said she did not believe that the last sentence of paragraph 33 would be redundant.

21. Mr. MORÁN BOVIO (Spain), supported by Mr. KASHIWAGI (Japan), agreed that the last sentence of paragraph 33 should be retained. The text was intended to help the authorities clarify the important issue of the boundaries of sovereign immunity, for the benefit of the other contracting parties. The French proposal seemed to enjoy the support of the majority of the Commission.

22. The CHAIRMAN noted that the last sentence of paragraph 33 would be retained, and paragraph 36, as orally amended by the French delegation, would be moved to the very beginning of the section on sovereign immunity.

23. It was so decided.

Draft recommendation 69

24. Mr. PANG (Singapore) noted that recommendation 69 in document A/CN.9/471/Add.9 should begin with the words "The concessionaire and the project promoters", to make it consistent with document A/CN.9/471/Add.7.

25. Mr. ESTRELLA FARIA (International Trade Law Branch) confirmed that understanding.

26. The CHAIRMAN assumed that the Committee wished to adopt the draft recommendation.

27. Draft recommendation 69, as orally amended, was adopted.

Draft recommendation 70

28. The CHAIRMAN, in the absence of any objection, assumed that the Commission accepted the text of draft recommendation 70.

29. Draft recommendation 70 was adopted.

30. Mr. KASHIWAGI (Japan) said that, according to paragraphs 30 and 43 of document A/CN.9/471/Add.7, arbitration was the preferred method for settling disputes; however, he had the impression that lenders usually preferred litigation, especially in large international financing transactions.

31. Mr. WIWEN-NILSSON (Observer for Sweden) said that while it was true that lenders did not usually want to have arbitration clauses in loan agreements, they normally did request such clauses in project agreements.

32. Mr. HERRMANN (Secretary of the Commission) pointed out that banks often resorted to arbitration in order not to be exposed to a jury trial and other features of litigation. In the case of project agreements, arbitration was the preferred method.

33. Mr. SARIE ELDIN (Egypt) said that he agreed with that point, particularly in relation to projects involving local and international financing. The statement that "arbitration is preferred by private investors and lenders" therefore reflected current trends and practice.

34. Mr. WALLACE (United States of America) said that there should be a clarification in paragraph 43, since it was concerned with loan agreements.

35. The CHAIRMAN said that that issue could be left to the Secretariat.

36. Mr. WIWEN-NILLSON (Observer for Sweden) said that paragraph 2 (a) of document A/CN.9/471/Add.7 should be amended, because it was not true that in "most" civil law countries, the project agreement was governed by administrative law. In paragraph 27, the words "or arbitrate" and "or arbitration" should be added after the words "litigate" and "litigation".

37. Mr. ESTRELLA FARIA (International Trade Law Branch) said that while it was true that not all civil law countries had the same system of separation of administrative jurisdiction, project agreements were invariably governed by administrative law.

38. Mr. MORÁN BOVIO (Spain) said that he supported the existing wording of paragraph 2 (a).

39. The CHAIRMAN said that the Commission still needed to resolve the issue of whether chapter VII should be combined with chapter I.

40. Mr. WALLACE (United States of America) said that he was in favour of moving chapter VII into chapter I, because it would simplify and streamline the final product.

41. Mr. REICHEL (Observer for the World Bank) said that a reading of chapter I, part B (3), in document A/CN.9/471/Add.2, showed that the contents of chapter VII fitted perfectly under the heading "General and sector-specific legislation". Chapter VII could be streamlined and shortened. However, competition law should be added to the list in that chapter.

42. Mr. MORÁN BOVIO (Spain) said that the issue was one of aesthetics. If chapter VII was incorporated into chapter I, that chapter would be too long, and the balance of the text as a whole would be lost.

43. Mr. WIWEN-NILSSON (Observer for Sweden) said that he agreed that the issue was cosmetic; the Commission should not rewrite the text.

44. Mr. MOHAMED (Nigeria) suggested that some parts of chapter VII could be moved to chapter I, and the rest left in chapter VII, in order to maintain the balance of the text as a whole.

45. The CHAIRMAN said that there would then be a debate on which parts of chapter VII should be moved.

46. Mr. RENGER (Germany) said that in 1999 the Commission had already held an extensive debate on chapter VII. It should not reopen that debate.

47. Mr. DEWAST (European Lawyers Union) said that he supported the proposal that competition law should be included in chapter VII, because it was a very important subject for investors.

48. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that chapter VII had originally been part of chapter I, but had been repeatedly expanded through the addition of further areas of law and had eventually become a separate section and moved to the end of the Guide. There had once been a separate chapter on competition law, but the Commission had decided that part of the chapter would be retained and incorporated into chapter I, and the rest would be deleted.

49. The CHAIRMAN stressed that the Commission should not reopen issues which had already been settled.

50. Mr. WALLACE (United States of America) said that if a streamlined version of chapter VII was incorporated in chapter I, that chapter would not be disproportionately long.

51. Mr. LALLIOT (France) said that his delegation was reluctant to take up either the substance of chapter VII, or competition law. His delegation had no firm view about whether chapter VII should be moved into chapter I, but noted that, since the chapters were of variable length, there would not be any significant imbalance in the structure of the Guide.

52. Mr. SARIE ELDIN (Egypt) proposed that chapter VII should become chapter II, so as to have a logical sequence from "General legislative and institutional framework" to "Other relevant areas of law". It would be unwise to embark on a discussion of chapter VII, or of the question of competition law.

53. Mr. WIWEN-NILSSON (Observer for Sweden) pointed out that there were already references to competition law in other parts of the Guide.

54. The CHAIRMAN said that there did not seem to be strong support for including competition law in chapter VII.

The meeting was suspended at 11.35 p.m. and resumed at 12.05 p.m.

55. The CHAIRMAN invited the Commission to comment on the proposal by the representative of Egypt that chapter VII should be relocated to follow chapter I.

56. Mr. WALLACE (United States of America), supported by Mr. REICHEL (Observer for the World Bank), supported the proposal.

57. Mr. MOHAMED (Nigeria) offered qualified support.

58. Mr. DARCY (United Kingdom) concurred: his delegation would not wish to countenance a prolonged debate on editorial and cosmetic issues. The adoption of the Guide was what really counted.

59. Mr. RENGER (Germany) said he preferred the order of chapters to remain unchanged. Chapter VII, dealing as it did with marginal points, had been placed at the end precisely so that it should not distract the reader from the main thrust of the Guide.

60. Mr. KASHIWAGI (Japan), Ms. GAVRILESCU (Romania) and Ms. MANGKLATANAKUL (Thailand) endorsed that view.

61. Ms. Li Ling (China) said that, if chapter VII were relocated, it would be necessary to decide on a new title, which could involve lengthy discussions. The order of chapters should be left unchanged.

62. Mr. MARADIAGA (Honduras) said that the current placement was satisfactory, whereas relocating chapter VII might prove more complicated than expected, without leading to any substantial improvement.

63. Ms. SANDERSON (Observer for Canada) said that cosmetic changes could inadvertently turn into substantive changes. Chapter VII should therefore remain in its present position.

64. Mr. WIWEN-NILSSON (Observer for Sweden) said that, having listened to all the arguments, he too supported the view expressed by the representative of Germany.

65. The CHAIRMAN took it that the Commission was in favour of leaving the order of chapters unchanged.

66. It was so decided.

67. The CHAIRMAN invited the Commission to consider the desirability of including a consolidation of the legislative recommendations in the final presentation of the Guide.

68. Mr. HERRMANN (Secretary of the Commission) said that the Secretariat was open to a request by the Commission that the legislative recommendations should appear in a consolidated form. He recommended, however, that rather than being issued separately, as in document A/CN.9/471/Add.9, they should appear in the same volume as the notes, which should be read in conjunction with them. A similar approach had been followed in earlier instances of legal documents. A subsidiary question was whether the recommendations should be repeated later in the volume together with the relevant notes. He would not advise that plan of action; the reader would find it easy to consult the recommendations, since they would be in the same volume.

69. Mr. MORÁN BOVIO (Spain) endorsed the Secretary's suggestion. There was no need to repeat the recommendations before the notes if they appeared in consolidated form at the start of the volume.

70. Ms. NIKANJAM (Islamic Republic of Iran) and Ms. GAVRILESCU (Romania) expressed support for the Secretary's suggestion.

71. Mr. WIWEN-NILSSON (Observer for Sweden) said that, if the suggestion was adopted, the first line of the foreword, contained in document A/CN.9/471/Add.9, would need to be changed.

72. The CHAIRMAN took it that, subject to the editorial change proposed by the observer for Sweden, the Commission wished to adopt the Secretary's suggestion.

73. It was so decided.

74. Mr. HAMILTON (Economic Commission for Europe) expressed his conviction that the Guide would prove a most valuable product. In Europe, in the 1990s, it had been assumed that a legal and regulatory framework was not as important as the existence of strong contracts between the public and private sectors. Experience had shown the exact opposite to be the case. The Guide would thus send a clear signal to Governments that legal and regulatory issues were vitally important for promoting public and private partnerships. The Economic Commission for Europe had promoted such partnerships over the past five years, with a particular emphasis on the transition economies of central and eastern Europe and the Commonwealth of Independent States. Considerable experience of the challenges in implementing such partnerships had thus been accumulated.

75. The need for a regulatory framework, a concession law, proper regulation for specific sectors, an efficient dispute resolution system and, in some instances, a constitutional framework had been clearly understood. Some Governments had little or no experience of working with the private sector, and project development costs could be considerable. His Commission had therefore adopted a pragmatic approach, preparing tools to help Governments, including advisory guidelines that complemented the Guide.

76. Many Governments, however, were moving to the next stage, that of project implementation. They were therefore given help in developing projects that could lead to an improvement of their legal framework. They were also being helped to develop an appropriate structure for promoting public and private partnerships. In the Czech Republic, for example, model projects in the transport and other fields were to be established.

77. His Commission also aimed to increase the confidence of Governments in negotiating with foreign investors. According to the World Bank, in some countries in Asia contracts were often biased towards the investor's side, with the result that projects were either stopped or renegotiated, with a corresponding waste of time and resources. A negotiating platform had therefore been prepared in order to help Governments determine what their public interests were and how to protect them.

78. The "build-operate-transfer" (BOT) group, which carried out promotion work for his Commission, consisted of a network of over 100 experts from the public and private sectors, with practical business experience. A major strength of the group was its neutrality: it was not the preserve of any one sector. It sought to maintain a balance between East and West and between public and private. The group had received considerable help from the Commission's own experts.

79. Lastly, he suggested that the best way of disseminating the Guide would be to organize joint seminars with his Commission to help explain the Guide in a practical way. Experts from his Commission would also be ready to assist in developing a concession law for the European region, using the Guide as a basis,

or else in developing standard documents on public and private partnership. Any such cooperation would save costs and would be to the mutual advantage of the two Commissions.

80. The CHAIRMAN called on all States to disseminate the Legislative Guide and accompanying notes and thanked the Economic Commission for Europe (ECE) for offering to assist in that task.

81. He then invited the Commission to consider whether it wished to undertake any further work in the area of privately financed infrastructure projects.

82. Mr. MORÁN BOVIO (Spain) asked the Secretariat to comment on the matter.

83. Mr. HERRMANN (Secretary of the Commission) said that when the Commission had begun its work on the Guide, the widely held view had been that it was not feasible to seek consensus on a model law or other statutory provisions. At present, however, he thought that it would be relatively easy to develop statutory provisions on the issue of procurement.

84. To be sure, the Commission's traditional task was to harmonize legal instruments and prepare uniform laws for international use. States with highly developed legal systems might have little interest, however, in amending their legislation to conform to a model law; it might be more feasible to provide model statutory provisions for adoption by States in need of them.

85. Before work on the Guide had begun, the legislation of some 80 countries had been examined and had revealed a wide variety of approaches to the topic; some national legal systems provided only an abstract framework while others included extremely detailed provisions. He therefore suggested that participants in the current session should be asked to comment on their specific needs rather than on the general desirability of such a project so that the Commission could assess not only the costs involved, but also how the differences in national legal systems could be accommodated in a model law.

86. One expert had suggested that as in the case of the Model Law on Procurement of Goods, Construction and Services, the Commission might develop a series of "road maps" that would include options appropriate to various legal systems.

87. Ms. NIKANJAM (Islamic Republic of Iran) said that States which had economies in transition and were endeavouring to attract foreign capital and modernize their infrastructure attached great importance to ensuring the establishment of fair, transparent domestic legislation and standards and to the harmonization of national legal systems in the field of trade. Since the Commission had completed its work on the Guide, she hoped that it would consider establishing a working group with a view to developing a model law or other statutory provisions that could be incorporated into domestic law as a basis for the implementation of project agreements.

88. Mr. LALLIOT (France) said he had hoped that the Secretary would reply in more practical terms; his delegation had sought information on alternatives to a model law; the procedure to be followed if one was to be developed, including

the establishment of a working group or expert group; the costs involved; and a reasonable timetable for completion of the project in light of the Commission's existing agenda.

89. Mr. DARCY (United Kingdom) said that his delegation was somewhat sceptical about the proposed project's feasibility. The Commission had devoted four years to the Guide and might require as much or more time to develop a model law; States might not be prepared to wait so long, and it would be unwise to waste scarce resources if there was limited support for such an instrument. He therefore suggested that the Secretariat should write to the Governments of all States members of the Commission in order to assess their interest in the proposal.

90. Mr. WALLACE (United States of America) said that his delegation had always been interested in the possibility of developing a model law. While it was true that a model law would not be of equal value to all Governments, it had been suggested that it might be used, inter alia, to harmonize legislation at the domestic level in a federal system like that of his own country.

91. He agreed that the Secretariat should be asked to contact Governments to assess their interest in such a project; however, he thought that the lessons learned during the Commission's work on the Guide would allow it to complete work on the model law within two years by establishing working groups. The Commission had addressed issues such as the form and content of draft model laws in the past with more success than it had been given credit for; his delegation had a number of suggestions to make in that regard. Above all, the Commission should remember that many countries desperately required investment in all sectors, especially that of infrastructure.

92. The CHAIRMAN suggested that the Commission should begin by asking participants whether their Governments were interested in the development of a model law.

The meeting rose at 1 p.m.

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Thirty-third session

SUMMARY RECORD OF THE 703rd MEETING

Held at Headquarters, New York,
on Thursday, 29 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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00-51136 (E)

The meeting was called to order at 3.10 p.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

1. Mr. HERRMANN (Secretary of the Commission), said that the alternative to a model law could be a compilation of model legislative provisions on certain aspects of the Legislative Guide. The question of form, however, could be decided only after a general feasibility study had been done.

2. As to the financial implications, the length of time needed for drafting would be a factor. Also, if the proposed feasibility survey indicated that only five or six subject areas in addition to procurement required further work, the ultimate cost would be much lower than if all the subject areas in the Legislative Guide needed coverage. Moreover, if a working group was established, the cost would be in the range of at least $150,000 for two weeks; whereas the cost of assembling a group of experts to assist the Secretariat would be more limited. Owing to the existing schedules of the working groups, no time would be available for a working group session on any new topic until the next session of the Commission.

3. Mr. SARIE ELDIN (Egypt) said that the Legislative Guide was a fine achievement but had not gone far enough. A model law of the kind previously adopted by UNCITRAL would represent a major development in international business law. The proposed model law should be an enabling law, to be used irrespective of sector or of the details of any particular legal system.

4. As the Commission had already spent four years on the Guide, it would probably require no more than two years to prepare the model law. If work could not begin before the next UNCITRAL session, perhaps a group of experts could be asked to make a first draft in the interim. At the appropriate time, his delegation was prepared to submit a list of the major issues to be covered.

5. Mr. ATWOOD (Australia) said that he supported the comments made at the previous meeting by the United Kingdom representative. His Government was neutral but was prepared to be guided by the views of those who felt a model law was needed. The process was, however, likely to be time-consuming and expensive. The provisions of the Legislative Guide - a very useful tool in itself - would require thorough review. His delegation proposed that before committing time and resources to a further project on the topic, the Commission should assess the impact of the Legislative Guide itself, which might prove to be by and large sufficient. The Secretariat should seek the opinions of the users of the Guide, especially those States which would require further guidance and would benefit most from further UNCITRAL work in the field. It might be that any future work should focus on the legislative capacities of particular States rather than the development of a model law for all. At any rate, only after such assessments could the Commission make a fully informed decision.

6. Mr. LAMBERTZ (Observer for Sweden) said that he favoured considering the possibility of a model law or other instrument. It was too early to know if a working group would be appropriate, particularly as other projects had priority

in the working groups. In any case, in order not to lose the momentum generated by the adoption of the Legislative Guide, the Commission should decide now to authorize a feasibility study. With the assistance of experts, but without wasting time canvassing States, the Secretariat should determine which areas were suitable for further work and which of those areas should take priority. It could even begin to draft some provisions if that was deemed appropriate.

7. Mr. RENGER (Germany) said that there was room for more work on the subject. He himself was not as optimistic as the Egyptian representative about the two-year time-frame for a model law. Moreover, a decision to draft a model law might be counter-productive, for countries would hold back from using the Legislative Guide if they knew that further work was being done.

8. Generally, a model law was written as a uniform law, but a model law on privately financed infrastructure projects would be implemented according to the domestic context. It would therefore make sense to see how the Legislative Guide worked in practice before embarking on a model law. UNCITRAL could draw up a joint project with the United Nations Conference on Trade and Development, the World Bank and the Economic Commission for Europe to identify countries that needed legislation in the field and to work with them in drafting laws on the basis of the Legislative Guide. Once that had been done, the usefulness of a model law could be reconsidered.

9. Mr. MORÁN BOVIO (Spain) observed that UNCITRAL must proceed to unify law in an ordered and gradual way. Some time should be allowed to pass in order to assess the impact of the Legislative Guide and hear what States had to say regarding their efforts to modify domestic law. There were precedents in the Commission for moving from guide to model law: the UNCITRAL Legal Guide on Electronic Funds Transfers had led to the UNCITRAL Model Law on Electronic Commerce after 12 to 15 years of work and had put UNCITRAL at the forefront of that field. There was surely a need for a model law in the field of privately financed infrastructure projects but it had to be determined which of the 70 recommendations in the Guide should be included in such a law. Far more than two years would be needed. The Commission should wait until the next session, and perhaps convening a group of experts would then be the logical first step.

10. Mr. MOHAMED (Nigeria) said that countries should be urged to use the Legislative Guide while the Commission began to think about fashioning a model law. A group of experts could be invited to set out the possible parameters of a model law and submit a proposal to the Commission at its next session.

11. Mr. HERRMANN (Secretary of the Commission), after pointing out that the Commission itself was composed of experts, said that generally when the Commission set up expert groups, the members had to come at their own expense and were not expected to make policy decisions. There was no money for language interpretation. He cautioned against trying to set up a body that was like a working group in all but name.

12. It would be odd for the Commission, having just adopted the Legislative Guide, to address a question that would require a study of the considerable disparities in legislative approach among States, since it was those disparities which had led the Commission to decide on recommendations as the most suitable

form in the first place. It was true that the Commission had adopted very successful model laws in the past. In the case of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, however, the situation had been entirely different: the Commission had established common terminology and a descriptive guide before any country had enacted legal provisions dealing with the new technology.

13. Ms. SANDERSON (Observer for Canada) endorsed the suggestion that the Secretariat should conduct a feasibility study with the assistance of experts.

14. Mr. WALLACE (United States of America) said that eventually the Commission would need to establish a working group. He would be willing to prepare a list of 10 issues which could be the subject of a preliminary draft.

15. Mr. LALLIOT (France) said that his delegation was less optimistic than other delegations that the Commission would be able to complete a draft model law in one year or less. The European Union had been discussing such an instrument since the early 1990s and had been unable to conclude its work. Since the Commission's budget did not allow for the convening of a working group before the next session, he proposed that the Secretariat should convene an expert group whose composition would reflect all legal traditions. The expert group should determine whether a model law was feasible; if so, it should decide on the topics to be covered and begin work on a preliminary draft. It would then be for the Commission, and the Commission alone, to decide at a future session whether a working group was necessary and, if so, to establish its mandate.

16. The CHAIRMAN invited the Secretariat to advise the Commission on the feasibility of convening an expert group with the characteristics stipulated in the French proposal.

17. Mr. HERRMANN (Secretary of the Commission) said that the phrase "all legal traditions" was sufficiently vague to enable the Secretariat to meet that requirement.

18. Mr. ADENSAMER (Austria) said that he associated himself with those delegations which believed that a wait-and-see approach was indicated.

19. Mr. MARKUS (Observer for Switzerland) said that, since the Commission had already produced a legislative guide, it was doubtful whether there would be an immediate need for a model law. He also failed to understand the need for an expert group since the members of the Commission were all experts.

20. Ms. GAVRILESCU (Romania) said that it was far too early to tell whether a model law would be desirable.

21. Mr. MARADIAGA (Honduras) said that the legislative guide was an invaluable tool for governments that should not be overlooked. His Government had already adopted legislation based solely on the documents prepared for discussion in the Commission.

22. Mr. Al-NASSER (Saudi Arabia) said that he shared the views of those delegations which advocated a wait-and-see approach. The Legislative Guide might prove to have a less beneficial impact in certain countries than was hoped.

23. Ms. Li Ling (China) suggested that a working group should begin drafting a model law at the next session. If that effort was fruitful, then the Commission could decide whether to retain the Legislative Guide or replace it with the model law.

24. Mr. KONKKOLA (Finland) said that it was too early to decide on future work. The matter should be deferred to the next session. He suggested that the Secretariat should prepare a feasibility study listing the topics to be covered by a model law.

25. Mr. MORENO RUFFINELLI (Paraguay) said that much of the work to be done on a model law had already been completed. It would be prudent to wait for the Legislative Guide to be adopted and implemented in several countries in order to determine its practicability. Consultations should be held with Governments and experts.

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

26. The CHAIRMAN invited the Commission to resume its discussion of a model law to be based on the Legislative Guide on Privately Financed Infrastructure Projects. The sense of the debate seemed to be that work on the topic should continue with a view to a model law, but perhaps not before the next session of the Commission.

27. Mr. MAZINI (Observer for Morocco) said that the finished Guide was a remarkable achievement in a short time, but, speaking as the representative of a developing country, he felt that a model law was needed in order to harmonize national laws on the subject and thereby facilitate international cooperation. The Guide had already identified the basic legal principles for such a law. His impression was that there was a strong consensus on the need to elaborate a model law, but also a recognition that it would be expensive. His delegation seconded the French proposal to assemble a group of experts in the course of the year to sketch out the broad outlines of such a law based on the principles set forth in the Guide.

28. Mr. MOHAMED (Nigeria) said that there seemed to be consensus on the need for a model law. The question at hand was how to preserve the momentum on the topic. Of the proposals put forward, the French proposal for an expert group, or perhaps an intergovernmental group, to meet during the course of the year seemed the most appropriate. It was probable that the expert group could prepare a draft for consideration by the Commission.

29. Mr. PINZÓN SÁNCHEZ (Colombia) said that his delegation was convinced of the importance of elaborating a model law, and, of course, the thinking already done on the Guide could move the project forward considerably, if momentum was maintained, since the law would be a logical extension of the Guide. However, in deciding how to go forward, the Commission should be mindful of the potential

problem raised by Germany. It would not be desirable for work on the model law to be construed as a lack of confidence in the Guide. In sum, his delegation was prepared to be flexible on the timing of the work, as long as there was basic agreement on the need for a model law.

30. Mr. DEWAST (Observer for the European Lawyers Union) said that the experience of France and the United Kingdom with the construction of the Eurotunnel had demonstrated the importance of a model law, even for developed countries. In the absence of such a mechanism of harmonization, the two countries had had to resort to special measures that had not proved entirely satisfactory. Hindsight had also made it clear that the sticking points were relatively few, concerning chiefly real estate on the United Kingdom side and financing guarantees and rate-setting on the French side. Adoption of a model law covering even a few central issues would have considerably facilitated the job of promoters and lenders involved in the Eurotunnel project.

31. The task the Commission was proposing to set itself might not be as insurmountable as it at first appeared and would indisputably be of value to developed and developing countries alike.

32. Mr. MORÁN BOVIO (Spain) said that his delegation believed that the next step was to disseminate the Guide to Governments and interested organizations and wait for feedback. If Governments requested help with their laws on privately financed infrastructure, that would be time enough to take action. There was always a danger that projects were self-perpetuating, without reference to reality. Efforts should be put into disseminating the Guide thoroughly.

33. The proposal of convening an expert group raised certain difficulties. It would not be easy to assemble jurists from all legal systems. Nor could the expert group elaborate a draft based on the recommendations alone. The Commission had no time during the present session to elaborate a mandate and terms of reference for such a group or to decide which of the 70 recommendations should be the focus of attention.

34. Mr. SARIE ELDIN (Egypt) said his delegation did not believe that the Commission should wait for reactions to the Guide. In any case, during the current discussion at least 12 countries had expressed the opinions of their Governments that a model law was called for. Naturally, financing and time constraints must be considered in deciding when and how to proceed, but the Commission could certainly take a decision in principle to go forward with a model law.

35. Mr. HERRMANN (Secretary of the Commission) said that the notion that an expert group might be able to draft provisions of a model law was in conflict with the Commission's settled practice that its texts were drafted only by the Commission or by a working group that was a subsidiary body of the Commission. On a practical level, the Commission had a very small budget to spend on expert groups.

36. During the consultation break, an idea had been raised which he would like the Commission to consider. Rather than rush into the drafting of a model law,

and possibly induce Governments to ignore the Guide while waiting for the law, the Commission could maintain momentum on the topic by holding a colloquium in collaboration with a partner, possibly a regional development bank. It had done something similar with its Colloquium on Cross-Border Insolvency prior to the elaboration of the Model Law on Cross-Border Insolvency.

37. The colloquium could probably be held during the first quarter of 2001, and experts on law reform assistance could be invited. It could serve the dual purpose of disseminating the Guide and exploring how much further one might go and in which subject areas. It would submit a report to the Commission at its next session, when the availability of working group time would be more evident.

38. The CHAIRMAN invited comments on the Secretary's suggestion of a colloquium and asked the members to bear in mind that it was not the Commission's practice to have expert groups draft its texts.

39. Mr. WALLACE (United States of America) said that a colloquium would be useful, because the Commission had not enjoyed the participation of many specialists in the field. However, if the Commission decided to hold a colloquium, he hoped it would not be too academic, and that the results of the Commission's work on the Guide would be available to the participants. While a model law would be of greatest benefit to the developing countries, it would also prove useful for developed countries, as experience had shown with the Eurotunnel. It was important to maintain momentum and also to avoid excessive complexity: seventy recommendations were too many, making it difficult to pin down the core provisions of the Guide.

40. The CHAIRMAN said that, if the Secretariat was to prepare the agenda for a colloquium, it would need clear guidelines from the Commission.

41. Ms. NIKANJAM (Islamic Republic of Iran) questioned whether the Commission should await reactions to the Guide before deciding whether to proceed with a model law. That might mean waiting a long time, because the State authorities concerned had many other things to deal with. It would be better for the Commission to pursue the work it had begun.

42. Mr. RENGER (Germany) said that the understanding of a model law now being expressed in the Commission was as a means of persuading legislators to enact law rather than as a tool for the harmonization of commercial law. He supported the proposal to hold a colloquium, within parameters set by the Commission and, if possible, with the help of other institutions which would be playing a part in disseminating the Guide.

43. Mr. ATWOOD (Australia) said that the preparation of a model law was not the only way to maintain the momentum of the Commission's work. He thought the holding of a colloquium would be an excellent idea as it would enable the Commission to gain an understanding of the practical difficulties of particular States and the kind of assistance they needed and to make an informed decision on whether the preparation of a model law was an appropriate response. It would also minimize the risk that the Guide might not be fully exploited if the Commission immediately began work on a model law.

44. Mr. REICHEL (World Bank) said he would seek to ensure participation by the World Bank in any colloquium organized by the Commission.

45. Ms. SANDERSON (Observer for Canada) supported the proposal for a colloquium. As the United States representative had pointed out, not all the experts in the field had been present at the session, so it was important not to opt for any particular direction in the Commission's work on it. It was also important to keep up the momentum, and a colloquium would be a useful means of doing so. A report from the colloquium could then be taken up by the Commission at its next session.

46. Mr. Al-NASSER (Observer for Saudi Arabia) said a colloquium could be a useful contribution to the preparation of a model law. A draft model law could be produced quite soon, perhaps within two years.

47. Mr. LALLIOT (France) said that a colloquium had just been held at the University of Paris to review the Eurotunnel project, which was an example of privately financed infrastructure. As for a colloquium on the Guide, it would have to be decided how it would be financed and organized, who would attend, and how it would be followed up. It must not be used as a smokescreen to avoid solving difficult issues. If those conditions were met, the idea was acceptable, although not the best solution.

48. Mr. SARIE ELDIN (Egypt) was afraid that holding a colloquium might merely delay progress on the topic for a further year, so that the momentum of the Commission's work would be lost. The rationale of its work, as the representative of Germany had said, was to promote the unification of commercial law, in both developed and developing countries. The preparation of a model law would not in any sense represent a deviation from that goal. However, he did not object to the proposal for a colloquium, provided that the Commission was clear about what it was intended to achieve.

49. The CHAIRMAN said that the Secretariat's intention was to have a wide-ranging colloquium, which should seek responses to the Guide and ideas for its implementation, not merely provide a forum for discussion. The outcome of the colloquium would be reported to the next session of the Commission, which would then have to decide what action to take.

50. Mr. SARIE ELDIN (Egypt) emphasized his concern that work might be delayed for another year, especially if the colloquium did not produce any specific conclusions on the viability of a model law.

51. Mr. WALLACE (United States of America) said that although the Commission had done some good work on the Legislative Guide, it should do more in order to meet the needs of the user countries and of other jurists. The proposed colloquium would serve that purpose if it focused on lawmaking and law reform.

52. Mr. MORÁN BOVIO (Spain) was convinced that a colloquium would be a very positive event. It was for the members of the Commission itself, rather than the Secretariat, to ensure its success. The colloquium should benefit from the views of experts and interest groups in the field.

53. The CHAIRMAN, summarizing the discussion, said that there was wide support in the Commission for holding a colloquium, provided that it made a real contribution to progress on the topic. It should address the need for further work on the Guide, identify the core provisions, obtain responses to the Guide and monitor its implementation. It should identify issues which could be dealt with in other ways, including by way of a model law. A report from the colloquium would be submitted to the Commission's next session. The Secretariat would endeavour to find a partner organization, preferably the World Bank, to assist with the organization of the colloquium, which should be open to anyone wishing to attend and should represent a wide range of views as well as the full spectrum of legal traditions. The colloquium should be held in the first quarter of 2001. If it was impossible for any reason to hold a colloquium, an expert group would be convened by the Secretariat, within resources available to it, which would proceed along the same lines and report to the Commission at its next session.

The meeting rose at 6.05 p.m.